



**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1977**

**No. 77-1486**

**JOSE GUADALUPE GARZA, JR.,**  
**Petitioner,**

**versus**

**THE UNITED STATES OF AMERICA,**  
**Respondent.**

**PETITION FOR A WRIT OF CERTIORARI**  
**TO THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

77-1486

Homero Margil Lopez  
349 Padares Line Road  
Brownsville, Tex. 78520

*For Petr*

## INDEX

	Page
OPINION BELOW .....	1
JURISDICTION .....	2
QUESTIONS PRESENTED FOR REVIEW .....	2
CONSTITUTIONAL PROVISIONS INVOLVED ...	2
STATEMENT .....	3
REASONS FOR GRANTING THE PETITION ....	5
CONCLUSION AND SIGNATURE .....	8
CERTIFICATE OF SERVICE .....	9
APPENDIX .....	1a

## CITATIONS

Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 .....	2,5,6
United States v. Lovasco, ___ U.S. ___, 52 L.Ed.2d 752, 97 S.Ct. ___ .....	2,7
United States v. Marion, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 4555 .....	2,4,6

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

---

No.

---

JOSE GUADALUPE GARZA, JR.,  
Petitioner,

versus

THE UNITED STATES OF AMERICA,  
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

Jose Guadalupe Garza, Jr., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on February 21, 1978.

**OPINION BELOW**

The opinion of the Court of Appeals below (Appendix, infra, p. 5a) is reported in \_\_\_\_ F.2d \_\_\_\_\_. The opinion of the District Court below was not reported.

## JURISDICTION

The judgment of the Court below (Appendix, *infra*, p. 5a) was entered on February 21, 1978. Rehearing was denied on March 30, 1978 (Appendix, *infra*, pp. 6a-7a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government can destroy evidence before the right of the Defendant to examine that evidence matures and thus avoid the consequences of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194.
2. What degree of evidence is necessary in order to establish the "reason" for the delay under *United States v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 4555 and *United States v. Lovasco*, \_\_\_ U.S. \_\_\_, 52 L.Ed.2d 752, 97 S.Ct. \_\_\_.
3. Whether the Trial Court can find the reason for the delay was "investigation" when there was no evidence to that effect. *Marion* and *Lovasco*, *supra*.
4. Whether or not the destruction of evidence by the Government during an investigation raises the presumption that it was done in order to obtain a tactical advantage. *Marion* and *Lovasco*, *supra*.

## CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution;  
"In all criminal prosecution, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

## STATEMENT

The facts necessary to place in their setting the questions now raised can be briefly stated:

### A. Course of proceeding in the case now before this Court.

On the 14th day of July, 1977, in a cause then pending in the United States District Court for the Southern District of Texas, Brownsville Division, entitled, "*The United States of America v. Jose Guadalupe Garza, Jr.*", Criminal No. B-77-148, Petitioner was found guilty by a jury on an indictment of 4 counts charging violations of 21 U.S.C. 846 & 841(A), Conspiracy to possess, heroin 21 U.S.C. 841(A)(1), distribution of heroin and 2 counts of using a communications facility in facilitation of a felony 21 U.S.C. 841(A)(1) and 21 U.S.C. 843(B).

On the 19th day of August, 1977, the District Court entered judgment and Petitioner was sentenced to twelve (12) years imprisonment to be followed by a special parole term of five (5) years on each of Counts One and Two; and to Three (3) years imprisonment on



each of Counts Three and Four. The terms were to run consecutively for a total of thirty (30) years imprisonment with a special parole term of ten (10) years.

**B. Relevant facts concerning the underlying conviction.**

The Appellant was tried and convicted on July 14, 1977, for acts which occurred on or about August 15, 1973 to September 7, 1973 (Indictment, Appendix p. 1a) some forty-four (44) months later. All of the counts of the indictment began on or about the 15 day of August, 1973, and ended on September 7, 1973, including the conspiracy. Three of the co-conspirators were arrested at the "buy-bust" on September 7, 1973 and were tried and convicted on October 23, 1973, only one other conspirator was arrested with Appellant and he plead guilty on June 10, 1977, without challenge to the time span. Appellant was not arrested, detained or charged with these crimes until his indictment in 1977, that at his first opportunity he moved for dismissal on the grounds that the 44 months violated his constitutional right to a speedy trial under the 6th Amendment, a hearing was heard on that point on June 10, 1977. At that hearing, the reason for the delay was explained by the Government through its D.E.A. agent Lunt; because he did not become aware of Appellant's participation until March. Based only upon this evidence the Trial Court made the finding that there was a good-faith investigation under *Marion* and denied the motion to quash.

Also on June 10, 1977, and again at the Appellant's first opportunity, the Appellant made a motion to have

his own or an independent chemist examine the Heroin he was accused of possessing. This was granted partially on the statements of the prosecutor, "that the Heroin was at the D.E.A. Lab in Dallas," however, the heroin had already been destroyed on July 16, 1974, a fact which became apparent at the trial.

**REASONS FOR GRANTING THE WRIT**

**A.**

**The Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.**

This is a suppression of evidence case. In the instant case, the Appellant was denied the opportunity to have his own expert examine the heroin, for which he was on trial; although it was admitted that he had that right. (The trial court even granting Appellant's pretrial motion in that regard) Yet the Government circumvented this right by destroying the evidence before the pretrial; in point of fact, the Government had destroyed the evidence long before the Appellant was arrested, or charged with any offense.

Since it would have been in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, if the Appellant had requested to examine the evidence and then the Government had destroyed it. The same reasoning would apply if the evidence is destroyed before it is requested. This is especially true if the evidence is destroyed before the Appellant's right to request matures, i.e., before he is even charged with a crime.

If this procedure were to go unchecked, it would allow the Government to sift through the evidence and witnesses against an individual before charging him with an offense and to arbitrarily sort out the good and the bad and then after the individual is charged, to use the excuse that the Government no longer has the evidence. Even if this is done in good faith an individual's right has been denied, and it still amounts to an ingenious method of avoiding the consequences of *Brady*, specifically; "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."

#### B.

The Court of Appeals has decided on important questions of Federal Law which have not been, but should be settled by this Court.

Although the Speedy Trial Clause of the Sixth Amendment is applicable only after a person has been accused of a crime and statutes of limitation provide "the primary guarantee against bringing overly stale criminal charges," *United States v. Marion*, 404 U.S. 307, 30 L.Ed.2d 468, 92 S.Ct. 4555, those statutes do not fully define a defendant's rights with respect to events antedating the indictment, and the Due Process Clause has a limited role to play in protecting against oppressive delay.

While proof of prejudice makes a due process claim ripe for adjudication, it does not automatically

validate such a claim and the reasons for the delay must also be considered.

To prosecute a Defendant following *good-faith investigative delay* . . . does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time. *United States v. Lovasco*, \_\_\_ U.S. \_\_\_, 52 L.Ed.2d 752, 97 S.Ct. \_\_\_.

In *Lavasco*, Justice Stevens dissented on the grounds that there was no evidence to support the reason for the delay. In the present case not only is there no evidence of a continuing good faith investigation, but if looked at circumstantially, there is evidence that the so-called investigation had terminated years prior to the trial.

In the instant case, the trial judge made a finding that the reason for the delay was investigative, in spite of the fact that *NO* witness ever testified that there was an investigation, and unlike *Lavasco*, did not even base his ruling on statement of counsel.

From a circumstantial viewpoint, that ruling is illogical. The co-defendants, the people who actually sold the heroin to the undercover agents, were arrested, tried and convicted, long before the Appellant was charged. At the time of the co-defendant's arrest, the transaction ended, (the undercover agents having exposed themselves at that point). The Government either had a case then or they did not. There was no indication at that time that a further investigation would reveal any more witnesses or evidence, and no one testified that they were looking. Under the facts of this

case there was no reason to look; there was simply nothing to find, either in the way of witnesses or evidence.

The only evidence offered by the government was that 44 months after the crime was committed an agent talked to two witnesses who knew of the Appellants' involvement, there was no evidence that these witnesses were unavailable or hard to locate, or that they had refused to testify. No explanation was given as to why they were not interviewed 44 months earlier.

The problem then is how much proof does the trial court need in order to make the determination that the reason for the delay is a good-faith investigation; Appellant feels that there must be at least a scintilla, particularly when there is evidence to the contrary.

### CONCLUSION

The judgment below is a unique and salutary departure from decisions of this Court which require that the Government not suppress evidence favorable to the Defendant and that he be granted a fair and speedy trial under the 6th Amendment. This Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

---

NAGO ALANIZ  
Counsel for Petitioner  
P. O. Box 539  
San Diego, Texas

### CERTIFICATE OF SERVICE

I, Nago Alaniz, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the \_\_\_\_ day of April, 1978.

---

Nago Alaniz



1a

**APPENDIX**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

**UNITED STATES OF AMERICA**

**versus Cr. No. B-77-184**

**JOSE GUADALUPE GARZA, JR.  
ADOLIO LAZARO CRUZ**

**INDICTMENT**

**THE GRAND JURY CHARGES:**

**COUNT 1**

That from on or about August 15, 1973, to on or about September 7, 1973, within the Brownsville Division of the Southern District of Texas, elsewhere, JOSE GUADALUPE GARZA, JR., and ADOLIO LAZARO CRUZ, hereinafter called defendants, and Efrain Leal Cavazos, Juan Trevino De La Cruz, and Luis Torres, co-conspirators but not co-defendants, knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute, a quantity of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, in violation of Sections 846 and 841(a)(1), Title 21, United States Code.



2a

Pursuant to and for the purpose of carrying out said unlawful combination, confederation, conspiracy, and agreement and to effectuate the objects thereof, the following and other overt acts were committed within the Brownsville Division of the Southern District of Texas:

*Overt Acts*

1. On or about August 19, 1973, JOSE GUADALUPE GARZA, JR., ADOLIO LAZARO CRUZ, Juan Trevino De La Cruz, and an unidentified male had a meeting at a Kip's Restaurant in Dallas, Texas, with two undercover special agents of the Drug Enforcement Administration.
2. On or about August 21, 1973, JOSE GUADALUPE GARZA, JR., had a telephone conversation with an undercover agent of the Drug Enforcement Administration.
3. On or about September 4, 1973, Efrain Leal Cavazos and Juan Trevino De La Cruz had a meeting with an undercover agent of the Drug Enforcement Administration at the No-Ka-Oi Lounge, 909 Savannah, McAllen, Texas.

*COUNT 2*

That on or about September 6, 1973, within the Brownsville Division of the Southern District of Tex-

3a

as, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., and ADOLIO LAZARO CRUZ did knowingly and intentionally distribute approximately two (2) pounds, one-fourth (1/4) ounces of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, contrary to Section 841(a)(1), Title 21, United States Code.

*COUNT 3*

That on or about August 21, 1973, in the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., did knowingly and intentionally use a communications facility, that is a telephone, in facilitating the distribution of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, such a distribution being a felony under Title 21, United States Code, Section 841(a)(1), in violation of Section 843(b), Title 21, United States Code.

*COUNT 4*

That on or about August 22, 1973, in the Southern District of Texas, and within the jurisdiction of this Court, JOSE GUADALUPE GARZA, JR., did knowingly and intentionally use a communications facility, that is a telephone, in facilitating the distribution of heroin, a controlled substance under Schedule I of the Controlled Substances Act of 1970, such a distribution being a felony under Title 21, United States

4a

Code, Section 841(a)(1), in violation of Section 843(b),  
Title 21, United States Code.

A TRUE BILL:

---

FOREMAN OF THE GRAND  
JURY

EDWARD B. McDONOUGH, JR.  
UNITED STATES ATTORNEY  
/s/ JOHN PATRICK SMITH  
JOHN PATRICK SMITH  
Assistant United States Attorney

5a

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 77-5543  
Summary Calendar\*

---

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

versus

JOSE GUADALUPE GARZA, JR.,  
Defendant-Appellant.

---

Appeal from the United States District Court for the  
Southern District of Texas

---

(February 21, 1978)

BEFORE RONEY, GEE and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.

6a

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

OFFICE OF THE CLERK

March 30, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5543 — U.S.A. v. JOSE GUADALUPE GARZA,  
JR.

Dear Counsel:

The enclosed order has this day been entered on petition for rehearing.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,  
EDWARD W. WADSWORTH,  
Clerk  
/s/ BRENDA M. HAUCK  
Deputy Clerk

bmh

enclosure

cc: Mr. Nago Alaniz  
Mr. James R. Gough, Jr.

7a

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 77-5543

---

UNITED STATES OF AMERICA,  
Plaintiff-Appellee.

versus

JOSE GUADALUPE GARZA, JR.,  
Defendant-Appellant.

---

Appeal from the United States District Court for the  
Southern District of Texas

---

ON PETITION FOR REHEARING

(March 30, 1978)

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE  
United States Circuit Judge